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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. ~~76-~~999

JANE COE, JANE DOE, JANE HOE, JANE MOE, JANE POE, THE NATIONAL WELFARE RIGHTS ORGANIZATION, and THE STATE OF ALASKA,

Petitioners,

—against—

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND MOTION FOR SUMMARY REVERSAL

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Petitioners,

—against—

F. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT, AND MOTION FOR SUMMARY REVERSAL

Petitioners pray for the issuance of a writ of *certiorari* before judgment to the United States Court of Appeals for the District of Columbia, to review the November 23, 1976 order of the United States District Court for the District of Columbia granting Respondent's motion for summary judgment and denying Petitioners' motion for summary judgment.

The identical legal question presented by this Petition is now pending on this Court's appellate docket in *Maher* v. *Doe,* No. 76-878, an appeal from the decision of the United States District Court for the District of Connecticut (three-judge court), 414 F. Supp. 1368. The opinion and injunc-

tion in *Maher* conflicts with the opinion and order in this proceeding. Accordingly, Petitioners also request summary reversal herein in the event that the order in *Maher* v. *Doe* is summarily affirmed as requested by appellees therein. In the alternative, Petitioners request that this case be heard with *Maher* v. *Doe* should that case be taken for plenary consideration.[1]

Opinion Below

The opinion and order of the district court, not yet reported, appears in Appendix A to this Petition. No decision has been rendered by the Court of Appeals on the order which is here sought to be reviewed.

Jurisdiction

The District Court's judgment was entered on November 23, 1976. Petitioners filed a notice of appeal on December 13, 1976 and an amended notice of appeal on December 15, 1976. The record was docketed in the Court of Appeals on December 16, 1976. No. 76-2118. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) and §2101(e), providing for the granting of a writ of *certiorari* upon the petition of any party before rendition of judgment by the Court of Appeals.

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[1] Petitioner State of Alaska has filed a brief *amicus curiae* in *Maher* v. *Doe* urging summary affirmance in that case or, in the alternative, consideration of that appeal together with the instant case. In that brief Petitioner represented that this Petition would be filed by January 17, 1977.

Statutes and Regulations Involved

The following statutes and regulations involved are set forth in Appendix B to this Petition:

1. Social Security Act §402(a) (26) (B), as amended by Pub. L. 94-88, §208(a), 89 Stat. 436, 42 U.S.C.A. §602(a) (26) (B).

2. Social Security Act §454(4), as amended by Pub. L. 94-88, §208(b), (c), 89 Stat. 436, 42 U.S.C.A. §654(4).

3. 45 C.F.R. §232.12

4. 45 C.F.R. §302.31

5. 45 C.F.R. §303.3

6. 45 C.F.R. §303.4(a), (b)

7. 45 C.F.R. §303.5

8. 45 C.F.R. §303.6

Question Presented

This Court ruled in *Lascaris* v. *Shirley*, 420 U.S. 730 (1975), that a state eligibility condition which required AFDC applicants and recipients to cooperate with the state in establishing the paternity of out-of-wedlock children, and in securing child support, was inconsistent with the Social Security Act as then in effect. Section 402(a) (26) (B) of the Social Security Act, effective August 1, 1975, now requires that, as a condition of eligibility, AFDC applicants and recipients must cooperate in such activities,

unless they are found to have good cause for refusing to do so as determined by their state welfare agencies in accordance with standards required to be prescribed by the Secretary of HEW which must take into consideration the best interests of the child on whose behalf aid is claimed. Also effective August 1, 1975, §454(4) of the Act now requires state child support agencies to establish paternity and secure support unless it is determined under such HEW standards to be against the best interests of the child.

However, currently effective regulations of the Respondent, at 45 C.F.R. §§232.12, 302.31, 303.3-.6, require each state to compel AFDC applicants and recipients to cooperate in establishing paternity and in securing child support as a condition of AFDC eligibility, and also requre each state to undertake to establish paternity and secure support for all appropriate children receiving AFDC benefits, without requiring the prior application of best interest standards, which standards have not yet been prescribed by Respondent.

The question presented, therefore, is whether the above federal regulations are inconsistent with the Social Security Act, as construed in *Lascaris*, because Congress did not intend by §402(a) (26) (B) and §454(4) to authorize the imposition of such cooperation and other child support requirements prior to the time the best interest standards required by such statutes have been issued and made effective by the Respondent, or whether Congress did intend to authorize the imposition of these requirements prior to such time.

Statement of the Case

The Petitioners, plaintiffs in the court below, are mothers of needy and dependent children who are or were recipients of benefits under the Aid to Families With Dependent Children (AFDC) program, the National Welfare Rights Organization (NWRO), whose membership is comprised of AFDC recipients, and the State of Alaska, which participates in the AFDC program through its Department of Health and Social Services. Respondent is the Secretary of the U.S. Department of Health, Education and Welfare. This case involves serious personal and financial injuries to Petitioners, and other needy and dependent children and their caretaker relatives throughout the nation, and risk of loss of federal matching funds for the State of Alaska's AFDC program.

The individual Petitioners are threatened with, or have already suffered, the loss of AFDC benefits because each of them has refused to cooperate with the agency administering the AFDC program in their respective states in locating the absent parent of a child, and in establishing the paternity of or securing support for such child. Some Petitioners also are imminently threatened with the possibility that their state will be able to locate the absent parent, and will thus proceed to establish paternity or attempt to secure support, even without their cooperation since state records may already contain the information necessary to identify the absent parent. The AFDC recipient Petitioners have refused to cooperate, and seek to prevent their respective states from establishing paternity or securing support, because they fear physical, emotional or other serious injuries that may result from the retaliatory actions of sick or dangerous absent parents, and the

impairment of stable family life because of the forced reestablishment of deleterious ties with such persons.

The State requirements have been imposed on Petitioners directly as a result of Respondent's regulations challenged herein, and discussed in detail below.[2] The predicament in which Petitioners find themselves, and the urgency of their claims, is demonstrated by their reasons for withholding cooperation. Examples of those reasons, which are precisely the types of problems Congress wanted the states to consider in determining if enforcement of the child support program should proceed in any case, are described below.

Petitioner Jane Coe's case is especially urgent. Petitioner Coe fears that if pursued by Pennsylvania her ex-husband may physically injure or possibly attempt to murder her. These fears are not unwarranted, since they are based on the past physical violence of her ex-husband, including his attempt to murder her in the course of divorce proceedings she brought against him. Petitioner's ex-husband was convicted of the attempted murder based, in part, on Petitioner's testimony. Petitioner Coe thus does not want to aid Pennsylvania in locating her ex-husband, and believes it imperative that the State be blocked from any such efforts undertaken without her help.

The injuries feared by Petitioners are not only of a physical nature. Petitioner Jane Hoe's refusal to cooperate with the Washington agency was based on fears of emotional and psychological harm. Jane Hoe knew her child's father for less than two months, when he and she were both only teenagers. Her child, who was born after

[2] Petitioner Alaska does not wish to implement the relevant federal rules since it believes them illegal and does not wish to risk physical or other injuries to its AFDC applicants and recipients.

they broke-up, looks to her grandfather as her father, and does not know of the existence of her real father. The father is mentally unstable,[3] and Petitioner believes any contact he could have with the child will seriously hurt her emotionally because of his poor character.

Petitioner Jane Moe refused to cooperate with the New York agency because her child's father is her sister's husband. Petitioner Moe feels that her healthy family and community relationships, and her relationship with her daughter, will be harmed if she discloses the father's identity, and that her daughter's mental health, peer relationships, and respect for her mother, will be damaged forever if she learns the identity of her father.[4] Petitioner has recently married, and her apprehension is thus heightened by the fact that her marriage and her child's relationship with her husband would be threatened with disruption if the father's identity became known by her husband.

The State of Alaska, unlike the states in which the other Petitioners reside, has not compelled its AFDC applicants and recipients to cooperate in location and support enforcement activities. The State firmly believes that the best interests of children receiving AFDC assistance should be protected in any scheme for requiring cooperation in the identification and location of absent parents and the collection of child support from those parents. Accordingly, the State does not wish to implement any cooperation re-

[3] This is based on information that he is a "juvenile recidivist", a user of heroin, has been in reformatories repeatedly, and in a state mental institution where he was committed for drug related reasons.

[4] Petitioner and her children have close ties with her parents, with whom they live, and her sister's family, who they see regularly. All reside in a small rural community, where most people know each other.

quirements until Respondent has taken steps to protect the "best interests" of the children as required by the Social Security Act.[5]

The irony in Petitioners' situations is that Congress has taken specific steps to insure that they would not be subjected to child support enforcement requirements without a prior opportunity to have their states determine whether such enforcement activities would be contrary to their children's best interests. The statutory and regulatory background to this controversy, which begins in late 1974, must be examined for a full understanding of the case.

At that time Congress enacted an entirely new child support enforcement program, Part D to Title IV of the Social Security Act, and in so doing added several new provisions to Part A of Title IV containing the basic AFDC program. Pub. L. 93-647, Part B, 88 Stat. 2351. One particular matter addressed by Congress was the fact that until that time the Social Security Act prohibited state welfare agencies from requiring the cooperation of the caretaker relative in establishing paternity and in securing child support. See *Lascaris* v. *Shirley*, 420 U.S. 730 (1975). Accordingly, in Pub. L. 93-647 Congress added §§402(a) (26) (B) and 454(4) to the Social Security Act, 42 U.S.C. §§602(a) (26) (B), 654(4), 88 Stat. 2359, and 88 Stat. 2354. These provisions were scheduled to take effect on July 1, 1975. Pub. L. 93-647, §101(f).

As orginally enacted, §402(a) (26) (B), at least on its face, required "cooperation" by all AFDC applicants and

[5] At the present time Alaska permits AFDC applicants and recipients to exempt themselves from child support enforcement, if they choose to do so, by indicating to the welfare agency that they believe cooperation would be against their child's best interests.

recipients without exception. Section 454(4), at least on its face, also required states to establish paternity and secure support in all cases in which such applicants and recipients had executed assignments of support rights, also without exception. It was the enactment of these provisions which caused this Court to note, in *Lascaris* v. *Shirley, supra,* that Congress had enacted legislation effective July 1, 1975 to resolve the conflict between the Social Security Act and the state rules declared illegal in that case. *Lascaris* v. *Shirley, supra,* 420 U.S. at 732-33.

The Respondent promulgated the federal regulations at issue in this case on June 26, 1975, to be effective July 1, 1975, in order to implement §§402(a) (26) (B) and 454(4) as they were enacted by Pub. L. 93-647. 40 Fed. Reg. 27155, 27160, 27165 (June 26, 1975). One regulation requires that each state's AFDC plan must provide that "as a condition of eligibility for assistance each applicant for or recipient of AFDC will be required to cooperate with the State in [establishing paternity and securing support]." 45 C.F.R. §232.12. Such required "cooperation" may include providing information to state officials and/or testifying at court proceedings. See 45 C.F.R. §232.12(b). Other HEW regulations challenged herein provide that, as a condition of HEW's approval of state child support plans under the new Part D of Title IV, such state plans must provide that the state child support collection agency, "will undertake to establish paternity . . . and to secure support" for all AFDC children. 45 C.F.R. §302.31.[6]

[6] HEW regulations at 45 C.F.R. §§303.3, 303.4, 303.5 and 303.6, more specifically implement this requirement in the cases of location of absent parents, the establishment of the support obligation, the establishment of paternity, and the enforcement of support obligations, respectively.

However, the statutory provisions under which the challenged HEW rules were promulgated *never* went into effect. Subsequent to the *Lascaris* decision of this Court, Congress postponed the effective date of §402(a) (26) (B) and §454(4) until August 1, 1975. Pub. L. 94-46, §2. Subsequently, Congress enacted significant amendments to these provisions, also to become effective on the August 1st effective date. Pub. L. 94-88, §§208, 210.

As amended, §402(a) (26) (B) provides *not* for the mandatory cooperation of applicants and recipients in every case, as HEW is now requiring, but rather that applicants or recipients shall be required to cooperate

> "*unless* . . . found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed . . . ." (emphasis added.)

Similarly, as amended, §454(4) (A) and (B) provide *not* for the states' undertaking to establish paternity and secure child support in every case, as HEW now requires, but rather that such activities be undertaken by the child support collection agency

> "*unless* the agency administering the plan under part A of . . . title [IV] determines in accordance with the standards prescribed pursuant to section 402(a) (26) (B) that it is against the best interests of the child to do so . . . ." (emphasis added.)

Although HEW reflected the Congressional postponement of the effective date of P.L. 93-647 by postponing the ef-

fective date of the implementing regulations to August 1, 1975, 40 Fed. Reg. 31766 (July 28, 1975), it permitted those regulations to go into effect on that date *without reflecting the significant changes enacted by Pub. L. 94-88.*

The federal standards required to be applied by the states for determining if cooperation should be excused for "good cause," and if support enforcement would be "against the best interests of the child," have still not been issued.[7] HEW officials have advised the states, including Petitioner Alaska, that they must implement §§402(a) (26) (B) and 454(4) as they read *prior* to the amendments of Pub. L. 94-88, according to the HEW regulations also issued prior to those amendments. HEW ruled that the amendments to §402(a) (26) (B) and §454(4) by Pub. L. 94-88 are not operational, and thus are to be ignored by the states, until such time as the Secretary issues the additional "best interest" regulations. The HEW rules in effect thus require that cooperation and child support enforcement must proceed without the required "best interest" determination. Moreover, HEW has advised the states that they are not free to develop and use their own interim standards since Pub. L. 94-88, §208, gives that power to the Respondent exclusively.[8]

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[7] Proposed "best interest" rules were issued on August 13, 1976, 41 Fed. Reg. 34298, but these rules have not yet been finalized. See *infra* at p. 24.

[8] HEW has advised its Regional Child Support offices that states *may* excuse cooperation in "special" or "unique" circumstances. This authorization is optional, however, and has not benefited the individual Petitioners. Further, since there are no standards for determining which cases are "special" or "unique," no State can be assured that on a subsequent HEW audit their findings would be sustained. Alaska thus has grounds to fear loss of federal reimbursement if it implements the federal rules subject to this ad hoc policy.

Petitioners have all suffered or are threatened with substantial injuries because of their non-cooperation, and failure to abide by the HEW regulations challenged herein. Petitioners Jane Coe and Jane Doe were ordered disqualified from aid after state fair hearings, although as of this date those decisions have not been implemented.[9] Petitioners Jane Hoe and Jane Moe have already been disqualified.[10] Because of Alaska's unwillingness to implement the HEW regulations it has subjected itself to a substantial risk that it will either lose all of its future federal funding for its AFDC program, 42 U.S.C. §604(a), or suffer a substantial retrospective financial penalty, 42 U.S.C. §§603(h), 604(d).

In order to avoid these injuries, Petitioners commenced this action against HEW Secretary Mathews in the U.S. District Court for the District of Columbia on May 7, 1976. They requested an injunction against enforcement of the challenged HEW regulations to relieve them from the injuries threatened or already suffered, or, in the alternative, a writ of mandamus directing HEW to forthwith

[9] Jane Coe feared that her former husband was released from prison after serving time for her attempted murder. Counsel have been advised by petitioner Coe subsequent to the district court proceedings that the former husband is, in fact, in the community and aware of Jane Coe's residence. Since the state has in its files information about the identity of the Coe father, her non-cooperation will not necessarily preclude state location efforts. She is thus faced with the possibility of being harmed by contact with the absent parent unless she withdraws her eligible children from the program, a "sanction" even harsher than that provided by Congress in §402(a) (26) (B), which only disqualifies the non-cooperating caretaker.

[10] Jane Moe's marriage does not disqualify her child from aid, but she has for the time being withdrawn him from the rolls in part to avoid any possibility that the state would continue to attempt to discover her child's father's identity.

prescribe the best interest standards that would at least ensure them the determination mandated by Congress prior to any enforcement against them of the child support requirements.[11]

During the pendency of the case before the district court, a three-judge district court in Connecticut decided the identical issue as presented in this case. In *Doe* v. *Maher*, 414 F. Supp. 1368 (D. Conn. 1976), appeal pending, *Maher* v. *Doe*, No. 76-878, the district court ruled that Connecticut was required to postpone implementation of the AFDC cooperation eligibility requirement until Secretary Mathews issues, in final form, the "best interest" standards required by Pub. L. 94-88. The court was aware of and specifically rejected Respondent's contention that the "best interest" exception is not applicable until the new regulations are issued and approved. In so doing the court noted that

> "Congress has not merely put the states on notice that it intends to begin worrying about the children's interests at some time in the future. Rather, it has expressed a strong desire that the cooperation requirements of Pub. L. No. 93-647 not be enforced in a manner contrary to the best interests of the very children whom the AFDC program is intended to assist." *Doe* v. *Maher, supra,* 414 F. Supp. at 1381.

Petitioners brought the *Doe* decision to the district court's attention.

On November 23, 1976 the district court granted Respondent's motion for summary judgment, and denied Peti-

[11] At oral argument on August 16, 1976, Petitioners advised the district court that their mandamus claim was moot, since the Respondent had published proposed regulations containing "best interest" standards three days earlier.

tioner's similar motion, without distinguishing or even citing the conflicting *Doe* decision. The court ruled that the "best interest" amendment of Pub. L. 94-88 was not effective prior to HEW's promulgation of implementing regulations and that, therefore, the cooperation and related requirements of Pub. L. 93-647, as they read prior to amendment, were properly placed in operation by the Respondent. The district court's decision placed no outside time limit during which Respondent must issue the regulations implementing Pub. L. 94-88, and thus the consequence of the decision is to place within Respondent's sole discretion the decision as to when (or if) the "best interest" amendment should be implemented.

ARGUMENT

I.

Certiorari before judgment should be granted.

Had the decision below been that of the Court of Appeals rather than the District Court, it is most likely that it would be viewed by this Court as one worthy of review on *certiorari*. The legal issue concerns the interpretation of an important federal statute, and the validity of federal agency regulations. The resolution of the issue directly impacts on the administration of the AFDC program in all 50 states.

Further, the federal policies involved touch upon the most intimate family relationships, and concern personal and economic interests that go to the very heart of the nation's public assistance, child welfare, and domestic relations policies and programs. The resolution of the con-

troversy also has considerable financial impact on the State of Alaska.

However, Petitioners seek *certiorari* before hearing and judgment in the Court of Appeals. Petitioners submit that this case is particularly appropriate for this Court's exercise of its discretion to grant *certiorari* before judgment, and present several considerations which strongly support this request.

1. *The identical issue is pending on this Court's appellate docket in* Maher v. Doe, *No. 76-878.*

The primary reason for granting *certiorari* before judgment and by-passing the usual process of appellate review is the pendency on this Court's appellate docket of *Maher* v. *Doe,* No. 76-878, a case which raises an identical question of federal statutory interpretation as is presented by this petition. See, e.g., *Hannah* v. *Larche,* 361 U.S. 910 (1959); *McCulloch* v. *Sociedad Nacional,* 372 U.S. 10, 12 (1963); *Brown* v. *Board of Education,* 344 U.S. 1, 3 (1952), inviting a petition for *certiorari* in *Bolling* v. *Sharpe,* 344 U.S. 873 (1952). This Court, in appropriate cases, has exercised its discretion to grant review prior to Court of Appeals action even where, as here, the similar case on the Court's appellate docket has not itself been accepted for plenary review. See, e.g., *Hannah* v. *Larche, supra.*

Both *Coe* and *Maher* will require an interpretation of §402(a) (26) (B) of the Social Security Act, and a determination as to whether the regulations promulgated by Respondent Mathews to implement federal AFDC child support legislation, which are at the core of the present administration of the AFDC child support program in all fifty states, are inconsistent with the language and intent

of the federal statute. Petitioners urge that Respondent's regulations at 45 C.F.R. §232.12, §302.31, and §§303.3-.6, directly violate the language and intent behind §402(a) (26) (B) and §454(4) of the Social Security Act, as amended by Pub. L. 94-88, which, they contend, by their terms preclude any mandatory cooperation rule or support enforcement until the best interests of the child are considered under standards required to be prescribed by the Secretary. See Point II, *infra*.

The *Maher* appeal also requests the Court to determine whether or not the federal child support regulations are consistent with §402(a) (26) (B) of the Act, despite the fact that Respondent is not a party to the *Maher* case. As originally filed, *Maher* v. *Doe* challenged a Connecticut statute under which unwed mothers were held in contempt of court, if upon being subpoenaed, they refused to disclose the paternity of their children. The three-judge court upheld the state statute under various constitutional and federal statutory attacks, *Doe* v. *Norton*, 365 F. Supp. 65 (D. Conn. 1973), and plaintiffs appealed to this Court. Since Congress subsequently had enacted Pub. L. 93-647, including the requirement that State AFDC programs must condition the mother's eligibility for AFDC on her willingness to cooperate, this Court vacated the judgment of dismissal and remanded for consideration, *inter alia*, of the effect of Pub. L. 93-647. *Roe* v. *Norton*, 422 U.S. 391 (1975).[12]

Subsequent to the remand order, Connecticut began to impose a cooperation requirement as an AFDC condition

[12] In remanding, the Court noted that the new federal statute had no sanction that was comparable to Connecticut's contempt penalty.

of eligibility based on the HEW regulations challenged in this case.[13] However, also subsequent to the remand, Congress enacted Pub. L. 94-88, which, as noted, took effect at the same time as Pub. L. 93-647, and which provided the "good cause/best interest" exception to the cooperation requirement. The three-judge court reiterated its rejection of the Constitutional challenges, and also ruled that despite the differences in sanctions between federal and Connecticut law, Congress has not intended to preempt Connecticut from applying a supplementary sanction to that imposed by the federal child support statute. *Doe* v. *Maher*, 414 F. Supp. 1368 (D. Conn. 1976). These rulings were not appealed to this Court by the *Maher* plaintiffs.

The *Maher* district court did rule, however, that both the State's contempt sanction and the AFDC eligibility sanction were subject to the "best interest" amendment to §402(a) (26) (B) enacted by Pub. L. 94-88. The three-judge court decided that Connecticut may not, consistent with the Social Security Act, terminate the eligibility of AFDC mothers because of their failure to cooperate in identifying the child's father, conduct which Respondent's regulations not only authorize, but *require*.[14]

As noted above, the *Maher* Court was aware of Respondent's view that the "best interest" amendment as yet has no meaning, but rejected that view based on its deter-

[13] Connecticut Department of Social Services Public Assistance Program Manual, §404.6 (eff. Nov. 1, 1975).

[14] *Maher* does not involve any question as to whether the contempt sanction should be required to be applied consistent with the conditions in §402(a) (26) (B) for applying the eligibility sanction. The dispute in *Maher* is over whether or not §402(a) (26) (B) itself is operative so as to authorize *either* the contempt *or* eligibility sanction at this time.

mination that Congress did not intend that §402(a) (26) (B) would be "enforced in a manner contrary to the best interests of the very children whom the AFDC program is intended to assist." *Doe* v. *Maher,* 414 F. Supp. at 1381, n. 20. Since the HEW standards for determining whether such enforcement would be contrary to the child's best interests were not yet in effect, it determined that Connecticut must "postpone any enforcement until the new regulations have been issued and approved." *Ibid.*[15]

This determination in *Maher* was appealed to this Court, and Connecticut argues in its appeal that the federal regulation at 45 C.F.R. §303.5,[16] which is challenged herein, is valid. See, *e.g.,* Jurisdictional Statement, *Maher* v. *Doe,* No. 76-878, at 13. The State argues that it should be permitted to continue mandating cooperation as an AFDC eligibility condition, and to sanction non-cooperation except in the very limited cases covered as optional exceptions in that regulation, without waiting for Secretary Mathews' implementation of Pub. L. 94-88 with final "best interest" standards. While the *Maher* appeal specifically cites only 45 C.F.R. §303.5, the State's appeal necessarily calls into question 45 C.F.R. §232.12 as well, since it is *that* regulation which requires Connecticut to obtain co-

[15] The Connecticut court only needed to consider the effect of Pub. L. 94-88 on §402(a) (26) (B) because of the posture of the case, which did not involve the state's enforcement of §454(4), but only the eligibility status of AFDC recipients.

[16] 45 C.F.R. §303.5(b) provides that the state child support agency *may* decide not to undertake the establishment of paternity if it believes that to do so would be against the best interests of the child, as defined in three narrowly drawn situations (rape, incest, pending adoption). By its terms, these exceptions are optional, and in any case do not specifically qualify the mandatory cooperation rule in 45 C.F.R. §232.12.

operation in paternity proceedings, and thus it is that rule which is in conflict with the district court's decision in *Maher.*

The decision on the *Maher* appeal will thus likely be dispositive of Petitioners' claims, and a ruling in *Maher* will be controlling on the Court of Appeals, even if decided by this Court without plenary consideration. See, e.g., *Hicks* v. *Miranda,* 422 U.S. 332 (1975). Judicial economy thus argues for resolving the pending cases simultaneously. See *Brown* v. *Board of Education, supra.*

2. *The validity of HEW rules and the interpretation of the federal statute should be adjudicated in a case to which the HEW Secretary is a party.*

The identity of legal issues between this case and *Maher* especially calls for simultaneous disposition in light of the fact that it is the interpretation of a federal statute by a federal agency that is called into question by both cases, and the federal agency is represented as a party only in the instant case. To be sure, it is not unusual for this Court to construe Social Security Act provisions in suits solely between individuals and participating State agencies. However, where the Court has the opportunity to decide such questions with HEW as a party before it, as here, there are compelling reasons to do so.

First, and most obviously, it is the validity of *Respondent's* rules which are questioned in both cases. Respondent's submission of a written (and perhaps oral) defense of his interpretation of the Social Security Act, through the Solicitor General, will certainly aid the Court in deciding the issues presented. While Respondent's participation in *Maher* as an *amicus* would permit him to defend his

regulations, it would not do so in an adversarial context, the only appropriate one in light of his status as a defendant in this case. Petitioners, who have directly challenged Respondent's policies, surely have the right to be heard with respect to the validity of those policies if Respondent is also heard.

Moreover, the resolution of the statutory interpretation question presented by the *Maher* appeal is of national importance, and will necessarily have an immediate and far-reaching impact on the administration of the AFDC and child support programs in all fifty states. Thus, affirmance of the decision of the three-judge court in *Maher* will mean that under the Social Security Act no state may require the cooperation of caretakers who refuse to assist in securing support or in establishing paternity until it can consider the best interests of their children, pursuant to standards issued by the Secretary. Also, the Respondent's current regulations, which are inconsistent with that interpretation of the statute, will in effect be superseded, and states will be required to modify their current procedures and policies until the Secretary acts in accordance with Congress' will. (Conversely, a reversal of the *Maher* decision, if based on a disagreement over the interpretation of §402(a) (26) (B), will validate state rules presently mandating cooperation.)

The presence of Secretary Mathews as Respondent will assure that any decision by this Court will be properly construed, and promptly implemented in *all* states, with prompt redress to the district court to resolve any subsequent disputes. There can be little doubt that translating the Court's decision in *Maher*, if an affirmance, into action in all 50

states will be tedious and might require considerable litigation absent a direct declaration and order against the offending federal regulations.[17] Indeed, several lawsuits raising identical issues to this suit and *Maher* are already pending throughout the country.[18]

Another reason that makes it desirable to resolve the issue presented by *Maher* with Respondent before the Court as an adversary is that appellant in *Maher* seeks reversal of the *Maher* decision on grounds not entirely consistent with the position of Respondent in this case. Thus, appellant in *Maher* does not dispute that the "best interest"

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[17] Decisions of this Court in Social Security Act cases where HEW is not a party have not always been promptly implemented by amended federal regulations, even where prior HEW interpretations had been rejected by the Court. See, e.g., *Carleson* v. *Remillard*, 406 U.S. 598, 600 (1972).

[18] Petitioners are aware of at least two pending federal court actions in addition to *Maher* v. *Doe* and this case challenging the validity of Respondent's regulations. *Roe* v. *Mathews*, Civ. Act. No. 76-138, D. Ariz., filed February 25, 1976; *Eldridge* v. *Dempsey*, Civ. Action M 7615 CA2, W.D. Mich., N.D., filed February 13, 1976. Petitioners are also aware of at least four state court actions which raised similar issues. *Doe* v. *Washington Dep't. of Social and Health Services*, No. 815794, Wash. Super. Ct., King County, Oct. 27, 1976, 10 Clearinghouse Review, 739; *Doe* v. *State of Maine*, Civil No. CA76 421, Superior Court, filed August, 1976; *Martella* v. *Pennsylvania Dept. of Public Welfare*, No. 1305 C.D. 1676, Commonwealth Court, filed Sept. 14, 1976; *Harer* v. *Pennsylvania Department of Public Welfare*, No. 486 C.D. 1976, Commonwealth Court, filed March 18, 1976. In *Doe* v. *Washington Dep't. of Social and Health Services, supra*, the Court disagreed with the result below, and set aside Washington's enforcement of the cooperation requirement because, in its view, that requirement was ineffective until HEW "best interest" standards are issued. In *Doe* v. *State of Maine, supra*, the Court ordered the State to determine if the plaintiff's non-cooperation was in the child's "best interest," an interpretation of the Act at odds with both HEW regulations and Petitioners' interpretation of the Act. Resolution of the conflict in lower court decisions by granting *certiorari* before judgment would be desirable in terms of judicial economy.

amendment to §402(a) (26) (B) became effective on August 1, 1975, but rather he contends that Congress intended that compliance with that amendment would be satisfied by implementing HEW's very limited optional exceptions at 45 C.F.R. §303.5 until such time as Respondent issues new standards as required by the amendment. See Juris. Statement, *Maher* v. *Doe,* pp. 12-13. Respondent, on the other hand, urged in the district court that the "best interest" exception to §402(a) (26) (B) is not yet operational. He admits that §303.5 does not implement Pub. L. 94-88, and argues that the cooperation requirement originally enacted by Pub. L. 93-647 is fully effective and may be applied by participating states without exception.[19] A complete presentation of the legal question requires both these views to be aired in this Court in an adversarial context.[20]

Finally, by granting this Petition the Court will afford itself the opportunity to consider another important aspect of the legal isssue presented by the lower court's implementation of Pub. L. 94-88, but one incapable of resolution without Respondent's presence before the Court. Under the decision below, the "best interest" amendment will remain ineffective until (or, indeed, unless) Respondent issues final implementing "best interest" standards; no time limitations were placed on Respondent's compliance, nor has Respondent evidenced any intention to act promptly in this regard.[21] Usual principles of statutory construction, however, require federal agency implementation of statutory mandates "forthwith" if no delay period is provided in the statute, see e.g. *Calvert Cliffs' Coordinating Committee* v. *United States Atomic Energy Commission,* 449 F.2d 1109 (D.C. Cir. 1971), particularly where, as here, the failure to implement runs directly contrary to the clear Congressional intent, see *infra,* pp. 28-31, that the children be immediately protected against potential injury as a result of child support enforcement. Although the unusual statutory interpretation giving Respondent unfettered discretion as to if or when to implement a statutory mandate need not be considered if this Court summarily affirms *Maher,* and grants summary reversal herein as requested in Point II, if this Court decides to hear plenary argument it should address this issue.

[19] Respondent's position is that 45 C.F.R. §303.5, just as the other rules challenged in this case, is valid, *not* because it contains the standards mandated by Congress, but because the part of these statutes mandating such standards is not self-implementing and can be ignored while mandatory cooperation and child support activity in all cases can be required.

[20] The differences in legal interpretations by the *Maher* and *Coe* parties, and the need to have all of them before this Court at the same time, is highlighted by HEW's surprising, inconsistent, and illogical representation to Connecticut that the *Maher* decision is consistent with HEW policy, Juris Statement, pp. 46-47, *Maher* v. *Doe*. Petitioners, on the other hand, relied on *Maher* in the court below and seek summary affirmance of *Maher* in this court. Indeed, the *Maher* court indicated that it had rejected HEW views.

3. *A prompt resolution of this case is imperative.*

A compelling reason for granting *certiorari* before judgment is the urgent need for prompt resolution of Petitioners' claims without resort to the usual time consuming appellate processes, so that, if their legal contentions are upheld, they may obtain immediate relief from the harms currently being inflicted upon them by their States' imple-

[21] Respondent's proposed rules were issued more than one year after enactment of Pub. L. 94-88, and the public comment period with respect to those proposed rules expired in September 1976. There is no indication that Respondent intends to finalize the rules quickly.

mentation of the Secretary's regulations. The individual Petitioners and their children, as well as an unknown number of others throughout the nation, have been subjected to substantial physical and emotional danger as a direct result of the Secretary's interpretation of federal law, and have lost substantial financial aid which they need to provide for the bare necessities of life, because of their efforts to protect their children. Petitioner *Coe,* for example, is now ineligible for her share of the AFDC grant because of her non-cooperation, *and* is still threatened with the possibility that the State will locate her former husband and trigger physical retaliation such as occurred when he tried to murder her during their divorce proceeding.

Moreover, even though Petitioners' claims are clearly substantial, absent direct review by this Court bypassing the Court of Appeals, the claims may well become moot before review can be had in this Court, thus depriving Petitioners of this Court's review of the important legal issues presented. Thus, while there is no indication as to when final "best interest" standards will be issued, and though they are not likely to be issued very soon, if this case cannot be heard by the Court until after it is decided by the Court of Appeals, such a decision might well be more than a year away. Such a time frame makes mootness prior to this Court's opportunity for review a very real possibility.

II.

The judgment below should be summarily reversed.

Petitioners believe that if this Court decides to consider this case together with the appeal in *Maher* v. *Doe,* it should do so without plenary consideration. Petitioners suggest summary reversal in this case, and summary affirmance in *Maher,* because the district court decision in *Maher* is so clearly correct, and that below so clearly erroneous, as to make further briefing or oral argument unnecessary.[22] A brief discussion of the background and merits of the statutory question will evidence that such summary treatment is appropriate.

As noted above, in June 1975 this Court, in *Lascaris* v. *Shirley,* invalidated as inconsistent with the Social Security Act a New York AFDC regulation which conditioned AFDC eligibility on the willingness of AFDC caretakers to cooperate in the prosecution of a deserting or abandoning parent for paternity and/or non-support. The Court relied exclusively on its prior decisions in *Townsend* v. *Swank,* 404 U.S. 282 (1971), and *Carleson* v. *Remillard,* 406 U.S. 598 (1972), which had held that state eligibility rules that are more restrictive than federal eligibility standards and are not specifically authorized in the federal statute or its legislative history are inconsistent with §402(a)(10) of the Act, 42 U.S.C. §602(a)(10), which requires the provision of AFDC to "all eligible individuals."

As also mentioned above, the *Lascaris* decision noted that effective July 1, 1975, the recently enacted federal child

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[22] Of coure, if *Maher* v. *Doe* should be affirmed prior to disposition of this petition, summary reversal is similarly appropriate.

support law would mandate such cooperation and thereby provide the specific federal statutory authority for such state requirements. Since that law had not yet taken effect, however, it played no part in the Court's decision, which was, of course, based on the law in effect at the time of the decision.

As indicated in the Statement of Case, §§402(a)(26)(B) and 454(4), as originally enacted, never took effect. First they were postponed one month, and then they were amended, the amendments targeted for effectiveness simultaneously with the postponed legislation. See *supra,* pp. 8-10. As amended (and, in effect, reenacted effective August 1st) §402(a)(26)(B) provides *in one sentence* for the imposition of a cooperation requirement, a sanction for non-compliance, *and* an exception to the requirement and sanction when a "good cause" finding is made under HEW "best interest" standards.[23] Petitioners contend that until all these provisions become *fully* implemented, the *Lascaris* decision is still binding on Respondent and the states.

Respondent's contention, accepted by the Court below, that the "requirement" clause of §402(a)(26)(B) and the "requirement" clause of §454(4) are effective, while the "exception" clauses of the same sentences are not in operation, is simply illogical. To be sure, it is not unusual for a statutory mandate to require some Executive action prior to its implementation. See, *e.g., Fletcher* v. *Housing Authority of Louisville,* 525 F.2d 532 (6th Cir. 1975). Petitioners suggest, however, that it is §402(a)(26)(B) and

[23] Similarly, §454(4) (A) and (B) each requires *in one sentence* that state child support agencies undertake to establish paternity and to secure support unless such undertaking will be contrary to the child's "best interests" under HEW standards.

§454(4) *in their entirety* which must await Executive action prior to implementation and that it is not just the exceptions to the requirements established in those provisions which are in abeyance. Respondent is not at liberty to implement a requirement that was itself rejected by Congress as too harsh, before he satisfies the condition precedent needed to implement the very changes made to that requirement in order to remedy the harshness.

In fact, Respondent concedes that the amendments made by §208 of Pub. L. 94-88 *are* in effect, since he agrees he is *presently* under a duty to establish the "best interest" standards required by that amendment. The real question in the case is the practical consequence that should be given to a fully effective statute which cannot be applied according to its terms prior to Executive action. We suggest that until it can be applied as written, it may not be applied at all.

The legislative history of the enactment and amendment of the child support program demonstrates the soundness of Petitioners' position (and that of the *Maher* court). Congress' solicitude for the interests of the children was clearly articulated even prior to the specific protective action taken in Pub. L. 94-88. Thus, while Pub. L. 93-647 contained no express language excusing cooperation where the best interests of the child may be harmed, it was clear from the Senate Committee Report, and statements on the floor of both Houses, that the interests of the children were of primary importance in determining whether the state should proceed to require cooperation or secure support.[24]

[24] See S. Rept. No. 93-1356, 93rd Cong. 2d Sess., (1974) at pp. 42, 51, 52; 120 Cong. Rec. S 21734 (Dec. 17, 1974) (daily ed.) (Remarks of Sen. Long); 120 Cong. Rec. H 12585, 12589, 12590 (Dec. 20, 1974) (daily ed.) (Remarks of Reps. Abzug and Fascell).

Indeed, Chairman Long of the Senate Finance Committee, the author of the original child support legislation, stated explicitly that he believed that children would be protected from harm under the new law since mothers would be required to assign their right to support to the state, and the states, rather than these mothers, would then proceed to institute support proceedings against absent fathers. This, he believed, eliminated the risk of retaliatory action. 120 Cong. Rec. S 21734 (Dec. 17, 1974) (daily ed.).

As noted above, just prior to July 1, 1975, Congress decided to delay the effective date of Pub. L. 93-647 for thirty days, until August 1st, to permit it to reconsider the entire child support program and to correct the many problems that had surfaced during the interim period after enactment. One such problem, was a recognition by members of Congress that the requirement to assign one's support rights would not fully protect the children, and that there was a need for specific statutory language providing

> "exemptions from mandatory cooperation in circumstances where cooperation is destructive and not in the best interest of the child." 121 Cong. Rec. E 3626 (July 8, 1975) (daily ed.) (Remarks of Rep. Fraser)

The House promptly took steps to provide those exemptions. The House Ways and Means Committee reported H.R. 8598, which included the "best interest" exemption that eventually was enacted as §208 of Pub. L. 94-88. The Committee report, in describing the amendment, emphasized its mandatory nature, and the general dissatisfaction with the original legislation and HEW's implementing regulations (which Petitioners seek to enjoin):

> "[M]embers of your committee expressed concern about the requirements for cooperation on part [sic] of a mother in instances where it clearly is not in the best interests of the child to establish a continuing relationship with the father even to the extent of attempting to locate him or to secure child support payments. The committee added language providing that *an applicant or recipient found to have good cause for refusing to cooperate would not be subject to this requirement.* The cooperation or non-cooperation would be determined by the State agency in accordance with the best interests of the child under standards prescribed by the Secretary of HEW. The committee's concern extends to situations in which the tracking down of the absent parent might subject the child or mother to a substantial danger or physical harm or of undue harassment. *The committee did not feel that the subject had been sufficiently covered in regulations developed by the Department of HEW.* At the same time, it does not intend that cooperation will be broadly waived because of a philosophy that the collection of child support does not generally serve the best interests of a child. *Its concern is with individual families where a significant hardship is likely if the provisions of Part D of Title IV are enforced.*" H. Rept. 94-368, 94th Cong., 1st Sess. (1975), at 7 (emphasis added).[25]

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[25] Similarly, Rep. Fraser, a member of the Committee, made the same point:

> "This bill corrects oversights in the 1974 act which would seriously disrupt the AFDC program and restores to the States their proper role in undertaking child support activities.
> . . . The regulations developed by HEW to implement this program allow for an exception to the mandatory cooperation re-

As the section-by-section analysis in the House report confirms, the mandatory requirements of §402(a)(26)(B) were not to be applicable in cases of potential harm:

> "the bill amends section 402(a)(26)(B) . . . to provide that *the requirements of such section . . . will not apply* where the applicant or recipient has good cause for refusing to cooperate, as determined by the State agency in accordance with standards which are to be prescribed by the Secretary and which must take into consideration the best interests of [the] child." H. Rept. No. 94-368, at 12 (emphasis supplied).[25]

The Committee thus specifically indicated that its bill would be effective August 1, 1975, the new effective date of Pub. L. 93-647, "thereby providing continuity *and avoiding the unfortunate effects that have been described.*" H. Rept. 94-368, at 8.

Rep. Corman, the House floor leader, brought the bill before the full House and repeatedly emphasized the need to approve changes in the law *before* it took effect, specifically noting that the best interests provision would correct

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quirement only in cases where incest or forcible rape have been involved. The committee wisely saw that these exceptions were limited and that there may be additional cases where cooperation may not serve the best interests of the child." 121 Cong. Rec. H 7143 (July 21, 1975) (daily ed.)

[25] Similarly, with respect to §454(4), the Committee noted its intent as follows:

> "Subsections (b) and (c) of section 7 amend section 454(4) of the Social Security Act to provide that the requirements of such section . . . ***will not apply where the State agency administering the AFDC plan finds,*** in accordance with the standards prescribed by the Secretary under section 402(a) (26) (B) (discussed above), that it is against the child's best interests to do so." H. Rept. 94-368, at p. 12 (emphasis added).

a "serious flaw" in the program which "unless corrected, could cause an irreparable damage to children and mothers . . . ." 121 Cong. Rec. H 7141 (July 21, 1975) (daily ed.). Rep. Corman pointed out that such revision was necessary to place the interests of the children at the forefront of the new program:

> "While doing what is necessary to see to it that absent parents provide support for the rearing of their children, we must not forget that *Federal* law should not cause harm in such a process to the same children as we are attempting to help through a strengthened program of enforcement of child support." 121 Cong. Rec. H 7141-2 (emphasis added).

It should also be noted that the bill provided for an August 1st effective date to specifically coincide with the revised effective date of Pub. L. 93-647, and the House was well aware that it was being asked to proceed expeditiously to that end. In fact, the House did so proceed, and passed H.R. 8598 overwhelmingly. 121 Cong. Rec. H 7145 (July 21, 1975).

The Senate soon thereafter adopted, with the approval of House committee leaders, many of the House provisions, and attached them to a tariff bill, H.R. 7710, which was agreed upon in that body with little debate or opposition. The Senate bill retained the best interests provisions as originally included in the House passed bill, and also provided for close Congressional supervision over such standards. In that respect, the Senate bill required that the standards be submitted to both Houses of Congress 60 days prior to their implementation, and provided that

either House may disapprove all such standards. H.R. 7710, §208(d).

The Senate's bill also contained an effective date of August 1, although it added the technical phrase, "unless otherwise specified therein," which eventually became §210 of Pub. L. 94-88. The court below relied on this technical provision to imply that Congress had intended §208 not to take effect until Respondent issued the necessary standards, since the requirements added by §208 necessarily could not have been implemented on August 1st.[27] There is no basis in either the statutory language or the legislative record to support this conclusion and, indeed, Respondent has not adopted such an interpretation. See, *supra*, p. 27.

As for the plain language of §208 of Pub. L. 94-88, there is no "specification" of a delayed effective date therein. Had Congress wished to delegate to Respondent the decision as to when the statute would take effect, without specifically designating such a delayed effective date in the statute, it would have done so unambiguously. See, *e.g., Fletcher* v. *Housing Authority, supra.* It would appear that the provision was added by the Senate to refer to a substantive provision which it also added to the House bill, which did provide for a delayed effective date. That provision permitted states up to seven months in which to implement the requirement in §402(a) (26) (A) of the Act, 42 U.S.C. §602(a) (26) (A), that recipients must assign support rights to their states. Pub. L. 94-88, §203.

[27] The court noted that the standards could not be implemented immediately because of the need to follow public rulemaking procedures of the Administrative Procedure Act, and because of the 60 day Congressional prior approval period.

Moreover, it is clear that had such a radical departure from the House's *expressed* intention to make §208 effective together with the rest of the child support program been intended, that issue would have been addressed specifically by at least one of the two Houses. Yet no mention was ever made that any such change was intended by the Senate's technical amendment. It is apparent that the lower court incorrectly interpreted the Congressional statute, and disregarded clear legislative history, in reaching its decision. Section 208 of Pub. L. 94-88 is obviously in effect, and thus §402(a) (26) (B) and §454(4) *as amended* are also in effect. Since these statutes necessarily cannot be *fully* implemented pending Respondent's further action, they were clearly not intended by Congress to be implemented at all prior to such time.

Petitioners submit that the above legislative discussion convincingly establishes the correctness of the court's interpretation of §402(a) (26) (B) in *Maher* v. *Doe,* and the error in the decision below.

CONCLUSION

The petition for a writ of *certiorari* before judgment should be granted, and the judgment below should be summarily reversed. In the alternative, if probable jurisdiction is noted in *Maher* v. *Doe,* No. 76-878, this petition should be granted and the cases set down for argument together.

January 14, 1977

Respectfully submitted,

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APPENDICES

APPENDIX A

Memorandum and Order

FILED
Nov 23 1976
JAMES F. DAVEY, *Clerk*

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

Civil Action No. 76-0794

JANE COE, *et al.*,

Plaintiffs,

v.

F. DAVID MATTHEWS,

Defendant.

I

This case presents a complex question of statutory interpretation under the 1975 Child Support and Establishment of Paternity Amendments to Title IV of the Social Security Act (the Act), 42 U.S.C. §601 *et seq.* Those amendments, in pertinent part, added a comprehensive new federal-state program for child support and the establishment of paternity at Title IV-D of the Act, 42 U.S.C. §651 *et seq.*, and correspondingly amended provisions of the Aid to Families with Dependent Children (AFDC) program under Title IV-A, 42 U.S.C. §601 *et seq.*

Plaintiffs are the National Welfare Rights Organization, the State of Alaska and five mothers of dependent children receiving assistance under the federally funded AFDC program. They commenced this action on May 7, 1976, seeking an order in the nature of mandamus directing the Secretary of Health, Education and Welfare (HEW) to issue, within twenty days, proposed standards to implement a statutory "good cause" exception for non-compliance with mandatory establishment of paternity, parental location and support provisions of the 1975 Amendments. In the alternative, the complaint requests declaratory and broad injunctive relief against the continued enforcement of existing HEW regulations until such time as standards pertaining to the good cause exception have become effective.

The plaintiffs have moved for summary judgment and the Secretary of HEW has filed a motion to dismiss, or in the alternative, for summary judgment.

II

There is a maze of statutory interplay between the Title IV-A AFDC and Title IV-D Child Support and Establishment of Paternity provisions of the Act.

Under the Title IV-A AFDC program, which is optional with the states, the costs of providing assistance in the form of money payments because of death, continued absence, or mental or physical incapacity of parents are shared by the federal and state governments. Certain caretaker relatives of such children are also eligible for federally subsidized AFDC assistance. 42 U.S.C. §606. The states are responsible for direct administration of their AFDC programs—state IV-A agencies, for example, make all eligibility determinations and set applicable need and payment standards. However, in order to qualify for substantial federal reimbursement of its AFDC expenditures, a state must operate its program under a state plan approved by the Secretary of HEW as meeting all applicable federal statutory and regulatory requirements. 42 U.S.C. §602(b).

The primary responsibility for "enforcing the support obligations owed by absent parents to their children, locating absent parents, establishing paternity and obtaining child support" under the new Title IV-D Child Support and Establishment of Paternity program rests with a single and separate state organizational unit, the state IV-D agency, 42 U.S.C. §651. Such Title IV-D agency carries out those functions under a state plan for child support which must meet all of the requirements of section 454 of the Act, 42 U.S.C. §654, and implementing federal regulations. Once its Title IV-D plan is approved by the Secretary, the state becomes eligible for reimbursement by the federal government of seventy-five percent of the expenditures made under that plan. In addition to review and approval of state child support plans, 42 U.S.C. §652(a)(3), the Secretary's responsibilities under Title IV-D include, *inter alia,* providing technical assistance to state IV-D agencies, periodically evaluating and auditing state child support programs, maintaining records of amounts collected by the states and reporting to Congress on the effectiveness of state child support activities. *See* 42 U.S.C. §652(a). Section 652(a)(1) further directs the Secretary of HEW to "establish such standards for state programs as he determines to be necessary to assure that such programs will be effective."

The specific statutory provisions of Title IV-A and Title IV-D which are at issue in the present case appear at 42 U.S.C. §602(a)(26)(B) and §654(4). Section 654(4) requires that state IV-D agencies must undertake to establish

the paternity of each child born out of wedlock on whose behalf assistance is claimed under the Title IV-A AFDC program, and to locate the absent parents (or other persons legally liable for support) of the AFDC children, and to obtain any support payments due to the children or their caretaker relatives. Section 602(a) (26) (B) of Title 42 mandates that state agencies administering AFDC programs under Title IV-A of the Act condition the eligibility for assistance of an AFDC applicant or recipient upon his or her cooperation with the state in the establishment of paternity, location and support efforts.

However, sections 654(4) and 602(a) (26) (B) permit Title IV-A and Title IV-D state agencies, respectively, to excuse the cooperation of an AFDC recipient or applicant, and to forego the establishment of paternity and parent-location and collection of support owed to an AFDC household upon a finding by the state Title IV-A agency that good cause exists for such an exception. It is further specified that such finding is to be made "in accordance with standards prescribed by the Secretary of HEW" pursuant to section 602(a) (26) (B), "which standards shall take into consideration the best interests of the child on whose behalf aid is claimed," 42 U.S.C. §§602(a) (26) (B), 654(4).[1]

Standards relating to the good cause exception of sections 602(a) (26) (B) and 654(4) have been published in proposed form;[2] and, on November 21, 1975, the Office of Child Support Enforcement, HEW, advised participating states

[1] The challenged HEW regulations, which implement the mandatory provisions of the above-cited statutory sections, appear at 45 C.F.R. §232.12 (Cooperation in obtaining support), §302.31 (Establishing paternity and securing support), §303.3 (Location of absent parents), §303.4 (Establishment of support obligations), §303.5 (Establishment of paternity), and §303.6 (Enforcement of support obligations).

[2] *See* discussion at n. 4, *infra*.

through the Agency's regional offices that state IV-A and IV-D agencies should "utilize care and common sense in administering its program so that children and their custodial parents or caretaker relatives will not be harmed by the support enforcement process."[3] Nonetheless, the only standards for excusing compliance to have been actually and formally incorporated to date in HEW regulations are limited to situations involving incest, forceable rape, or adoption where "in the opinion of the IV-D agency, it would not be in the best interests of the child" to undertake the establishment of paternity. 45 C.F.R. §303.5(b).

III

Subsequent to the filing of plaintiffs' summary judgment motion, certain action taken by the Secretary of HEW has rendered the mandamus aspects of this litigation moot.[4] Accordingly, the narrow question remaining before the Court is whether defendant's present regulations, which implement the mandatory provisions but not the good cause exception of sections 602(a) (26) (B) and 654(4), are inconsistent with the underlying statutory authority of Title IV of the Act.

[3] Memorandum from the Acting Director, OCSE, to the Acting Regional Director, OCSE, November 21, 1975 (Affidavit of Louis B. Hays, Attachment 1); *see also* Letter from the Deputy Director, OCSE, to the Attorney General of Alaska, April 8, 1976 (*Id.*, Attachment 2); Letter from Assistant U.S. Attorney, Phoenix Arizona, to the Assistant Attorney General, Arizona, March 29, 1976 (*Id.*, Attachment 3).

[4] On August 6, 1976, the acting Secretary of HEW issued a notice of proposed rule making detailing standards for the so-called good cause exception. That notice was published for public information and comment in the Federal Register of August 13, 1976. 41 Fed. Reg. 34298-99. In accordance with section 208(d) of Public Law 94-88, 89 Stat. 436, a report on the proposed standards was submitted to Congress on August 6, 1976. *But see* 11 Pres. Doc. no. 33, p. 856.

Mandatory provisions of the statutory sections at issue in the present case originated in the Social Services Amendments of 1974 which were signed into law by President Ford on January 4, 1975. P.L. 93-647, 88 Stat. 2337, H.R. 17045 (93rd Cong. 2d Sess.).

Among a number of changes in existing law effected by P.L. 93-647, section 101(a) created a new Part D of Title IV of the Social Security Act, establishing a comprehensive federal-state "Child Support and Establishment of Paternity Program." The Title IV-D provisions included, at section 654(4) [section 454(4) of the Act], a requirement that state plans for child support must provide that such states will undertake:

> (A) in the case of a child born out of wedlock, with respect to whom an assignment under section 402(a)(26) of this title is effective, to establish the paternity of such child, and
>
> (B) in the case of any child with respect to whom such an assignment is effective, to secure support for such child from his parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other states, except that when such arrangements and other means have proven ineffective, the state may utilize the Federal courts to obtain or enforce court orders for support.

Amending the AFDC provisions of Title IV-A of the Social Security Act, P.L. 93-647, §101(c)(5) included a new section 602(a)(26) [section 402(a)(26) of the Act] which mandated that a state AFDC plan must provide that, as a condition of eligibility for aid, each applicant or recipient will be required

> (B) to cooperate with the state (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child that, if the relative with whom the child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section).

Neither section 654(4) nor section 602(a)(26) as enacted in P.L. 93-647 recognized exceptions to their mandatory cooperation requirements.

The final provision of P.L. 93-647 which is pertinent to our consideration stated that the amendments made by section 101 (e.g., including 654(4) of Title IV-D and 602(a)(26)(B) of Title IV-A), with certain exceptions not here relevant, "shall become effective on July 1, 1975." P.L. 93-647, §101(f).

Approximately two months in advance of P.L. 93-647's July 1 effective date, HEW published proposed regulations to implement the Title IV-D Child Support and Title IV-A AFDC amendments. 40 Fed. Reg. 19207-8 (May 2, 1975); 40 Fed. Reg. 20096-20105 (May 8, 1975). These regulations, which were also scheduled to take effect on July 1, 1975, were published in final form in the Federal Register of June 26, 1975. 40 Fed. Reg. 27155, 27160, 27165.

On June 26, 1975, however, Congress acted to postpone the effective date of section 101 of P.L. 93-647 for one

month, "[w]hen it became obvious just prior to July 1 that there were certain technical problems in the bill which had to be resolved before it could work satisfactorily."[5] *See* P.L. 94-46, 89 Stat. 245, H.R. 7709 (94th Cong. 1st Sess.). In accordance with that change, HEW amended the effective date of its regulations to coincide with the revised effective date of the Title IV-A and IV-D amendments. *See* 40 Fed. Reg. 31766 (July 28, 1976).

Finally, on August 1, 1975, the date upon which P.L. 93-647's Child Support and AFDC amendments and HEW's implementing regulations became effective Congress passed P.L. 94-88, 89 Stat. 433, H.R. 7710 (94th Cong. 1st Sess.), an act relating to tariff treatment of watches and watch movements, which included a nongermane amendment that made several important changes in the Child Support and AFDC Amendments of P.L. 93-647. Only three of those modifications relate to the question presently before the Court.

First, P.L. 94-88 amended sections 654(4) and 602(a)(26)(B) of Title IV as enacted in P.L. 93-647, providing for the first time an exception to their mandatory establishment of paternity, location and support requirements provisions where there is "good cause" for non-compliance, as determined by the state IV-A agency,

> *in accordance with standards prescribed by the Secretary* of HEW, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed (emphasis supplied). P.L. 94-88, Title II, §208 (a)-(c).

Second, section 208(d)(1) of P.L. 94-88 requires that the "standards prescribed by the Secretary" relating to the

[5] H.R. Rept. No. 94-368, H.R. Comm. on Ways and Means, July 17, 1975 (94th Cong. 1st Sess.) at 3.

good cause exception must be submitted to Congress and that

> [s]uch standards shall take effect at the end of the period which ends 60 days after such proposed standards are so submitted to such committees unless, within such period, either House of Congress, adopts a resolution of disapproval.

And finally, section 101(f) of P.L. 93-647, as amended by P.L. 94-46, which stated, in pertinent part, that the Title IV-A and IV-D amendments "shall become effective on August 1, 1975," was further amended by section 210 of P.L. 94-88 which provides

> The amendments made by this title [P.L. 94-88, Title II] shall, *unless otherwise specified therein,* become effective August 1, 1975. (Emphasis supplied.)

V

The parties in this litigation are in basic agreement, and we think it clear beyond peradventure that the statutory good cause exception of sections 602(a) (26) (B) and 654(4), by its terms, is not a self-implementing provision. The language of those sections clearly stated that invocation of the exception by AFDC applicants or recipients and determinations of eligibility by state IV-A agencies are contingent upon the terms of HEW standards defining the exception's scope.

Plaintiffs, nonetheless, insist that the only reasonable interpretation of those sections is one which nullifies their mandatory cooperation requirements in the absence of standards implementing the good cause exception. We disagree.

The rule-making procedures relating to good cause standards which are contemplated by P.L. 94-88 necessarily entail an hiatus between the date of enactment, August 1, 1975, and the final adoption of such standards. Under pertinent provisions of the Administrative Procedure Act (APA), 5 U.S.C. §553, notice of the proposed standards must be published in the Federal Register and an opportunity given for public comment. After HEW has considered relevant matters submitted by the public and, if appropriate, modified its standards, the good cause standards must be published in final form not less than 30 days prior to their effective date. Then, in accordance with section 208(d) (1) of P.L. 94-88, the Agency is required to submit its standards to Congress and "they shall take effect at the end of the period which ends 60 days after" their submission, "unless within such period, either House of Congress adopts a resolution of disapproval." Should such a unicameral veto be exercised, of course, the entire rule-making process would begin anew.

The language of sections 602(a) (26) (B) and 654(4), read in conjunction with procedures mandated under the APA and P.L. 94-88, §208(d) (1), reveals Congress' desire to maintain a degree of executive and legislative control over the good cause exception which is antithetical to an effective date of August 1, 1975, for that exception.

In recognition of this fact, Congress specified that P.L. 94-88's Title IV amendments, which include the good cause exception, would become effective on August 1, 1975, "unless otherwise specified therein."

Notwithstanding the general effective date of August 1, 1975, made applicable to, *inter alia*, the mandatory cooperation provisions of sections 602(a) (26) (B) and 654(4) by P.L. 93-647, as amended by P.L. 94-46, the Court is of the opinion that the effective date of the good cause exception

was "otherwise specified" by the terms of P.L. 94-88 to be that date upon which HEW's standards, promulgated in accordance with procedures discussed above, have become effective.[8]

Consequently, we find that HEW's existing regulations are not inconsistent with the statutory authority of Title IV of the Act.

VI

Order

On the basis of the foregoing, it is, by the Court this 23rd day of November, 1976,

Ordered, that plaintiffs' motion for summary judgment should be, and the same is hereby, denied. And it is further

Ordered, that defendant's motion for summary judgment should be, and the same is hereby, granted.

/s/Howard F. Corcoran
Judge

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[8] Although our decision is based upon the language and contextual development of the Title IV amendments, the legislative history of P.L. 94-88 further demonstrates that plaintiffs' interpretation of sections 602(a) (26) (B) and 654(4) is unsound. The Congressional debates on S. 7710, later enacted as P.L. 94-88, reflect a keen awareness that the mandatory provisions of those sections (as enacted in P.L. 93-647) and HEW's implementing regulations became effective on the same date that P.L. 94-88 was considered and passed. And, more importantly, those debates reaffirm the legislative intent that the previously enacted provisions of P.L. 93-647, as amended by P.L. 94-46, *should* take effect on August 1, 1975. (*See* 121 Cong. Rec. S. 14921-14924, H. 8155-8157, Aug. 1, 1975). Were the Court to accept plaintiffs' interpretation that the mandatory provisions of sections 602(a) (26) (B) and 654(4) are null in the absence of HEW's good cause standards, the August 1, 1975, general effective date would be read out of the statute and that clear Congressional purpose ignored.

APPENDIX B

Statutes and Regulations Involved

Social Security Act §402(a)(26)(B), as amended by Pub. L. 94-88, §208(a), 89 Stat. 436, 42 U.S.C.A. §602(a)(26)(B).

[A State plan for AFDC must] provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

• • •

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b)(2) (without regard to subparagraphs (A) through (E) of such section).

Social Security Act §454(4), as amended by Pub. L. 94-88, §208(b), (c), 89 Stat. 436, 42 U.S.C.A. §654(4).

[A State plan for child support must] provide that such State will undertake

(A) in the case of a child born out of wedlock with respect to whom an assignment under section 402(a)(26) of this title is effective, to establish the paternity of such child, unless the agency administering the plan of the State under part A of this title determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) that it is against the best interests of the child to do so, and

(B) in the case of any child with respect to whom [an] assignment is effective, to secure support for such child from his parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States, (unless the agency administering the plan of the State under part A of this title determines in accordance with the standards prescribed by the Secretary pursuant to section 402(a)(26)(B) that it is against the best interests of the child to do so) except that when such arrangements and other means have proven ineffective, the State may utilize the Federal courts to obtain or enforce court orders for support;

45 C.F.R. §232.12 Cooperation in obtaining support.

The State plan must provide that:

(a) As a condition of eligibility for assistance, each applicant for or recipient of AFDC will be required to cooperate with the State in:

(1) Identifying and locating the parent of a child with respect to whom aid is claimed;

(2) Establishing the paternity of a child born out of wedlock with respect to whom aid is claimed;

(3) Obtaining support payments for such applicant or recipient and for a child with respect to whom aid is claimed; and

(4) Obtaining any other payments or property due such applicant or recipient of such child.

(b) "Cooperate" includes the following:

(1) Appearing at the offices of the State or local agency or the child support agency as necessary to provide verbal or written information, or documentary evidence, known to, possessed by, or reasonably obtainable by him, that is relevant to achieving the objectives of paragraph (a) of this section;

(2) Appearing as a witness at court or other hearings or proceedings necessary to achieving the objectives of paragraph (a) of this section;

(3) Providing information, or attesting to the lack of information, under penalty of perjury; and

(4) After an assignment under §232.11 has been made, paying to the child support agency any child support payments received from the absent parent which are covered by such assignment.

(c) If the child support agency notifies the State or local agency of evidence of failure to cooperate, the State or local agency shall act upon such information in order to enforce the eligibility requirements of this section.

(d) If the relative with whom a child is living fails to comply with the requirements of paragraph (a) of this section, such relative shall be denied eligibility without regard to other eligibility factors.

(e) If the relative with whom a child is living is found to be ineligible for assistance because of failure to comply with the requirements of paragraph (a) of this section, any aid for which such child is eligible (determined without regard to the needs of the caretaker relative) will be provided in the form of protective payments as described in §234.60 of this chapter.

45 C.F.R. §302.31 Establishing paternity and securing support.

The State plan shall provide that the IV-D agency will undertake:

(a) In the case of a child born out of wedlock with respect to whom an assignment under §232.11 of this title is effective, to establish the paternity of such child; and

(b) In the case of any child with respect to whom such assignment is effective, to secure support for such child from any person who is legally liable for such support, utilizing reciprocal arrangements adopted with other States when appropriate.

45 C.F.R. §303.3 Location of absent parents.

For all cases referred to the IV-D agency pursuant to §235.70 of this title or applying under §302.33 of this Chapter, the IV-D agency must attempt to locate all absent parents when their location is unknown. Under this standard, the IV-D agency must:

(a) Use appropriate local locate sources such as officials and employees administering public assistance, general assistance, medical assistance, food stamps and social services (whether such individuals are employed by the State or a

political subdivision), relatives and friends of the absent parent, current or past employers, the local telephone company, the U.S. Postal Service, financial references, unions, fraternal organizations, and police, parole, and probation records if appropriate;

(b) Establish working relationships with all appropriate local agencies in order to utilize local locate resources effectively;

(c) Use appropriate State agencies and departments, which as a minimum must include those departments which maintain records of public assistance, unemployment insurance, income taxation, driver's licenses, vehicle registration, and criminal records;

(d) Utilize all appropriate State and local locate sources within 60 days of referral of the case pursuant to §235.70 of this title or application under §302.33;

(e) Transmit cases to the Federal PLS if a reasonable and diligent State and local locate effort has failed to locate the absent parent;

(f) Refer cases to the IV-D agency of any other State if there is reasonable belief that the absent parent may be present in such State. The IV-D agency of such other State shall follow the procedures prescribed in paragraphs (a)-(d) of this section for such cases.

45 C.F.R. §303.4(a), (b) Establishment of support obligations.

For all cases referred to the IV-D agency pursuant to §235.70 of this title or applying under §302.33 of this Chapter, the IV-D agency must:

(a) When necessary, establish paternity pursuant to the standards of §303.5;

(b) Utilize appropriate State statutes and legal processes in establishing the support obligation pursuant to §302.50 of this chapter.

45 C.F.R. §303.5 Establishment of paternity.

(a) For all cases referred to the IV-D agency pursuant to §235.70 of this title or applying under §302.33 of this chapter in which paternity has not yet been established, the IV-D agency must:

(1) Attempt to establish paternity by court order or other legal process established under State law; or

(2) Establish paternity by acknowledgment if under the State law such acknowledgment has the same legal effect as court-ordered paternity, including the right to benefits other than child support.

(b) The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity.

(c) The IV-D agency shall identify laboratories within the State which perform legally and medically acceptable tests, including blood tests, which tend to identify the father or exclude the alleged from paternity. A list of such laboratories shall be available to appropriate courts and law enforcement officials, and to the public upon request.

45 C.F.R. §303.6 Enforcement of support obligations.

For all cases under the State plan in which the obligation to support and the amount of the obligation have been established, the IV-D agency must maintain an effective system for identifying, within 30 days, those cases in which there is a failure to comply with the support obligation and to contact such delinquent individuals as soon as possible in order to enforce the obligation and obtain the current support obligation and any arrearages. Such attempts to collect support must include the institution of the following procedures as applicable and necessary:

(a) Contempt proceedings to enforce an extant court order;

(b) Garnishment or similar proceedings if the State's statutes and constitution permit such a procedure and the individual can be brought under the jurisdiction of the courts of the State;

(c) Proceedings to attach real or personal property if the State's law provides for such a procedure and the individual is subject to such procedure;

(d) Any other collection or enforcement procedure described in the State plan pursuant to §302.17 of this chapter;

(e) Applications to utilize the courts of the United States pursuant to §302.72 of this chapter, and proceedings to enforce an order in the courts of the United States if such application is certified; and

(f) Applications for collection of the delinquent child support obligation by the Secretary of the Treasury pursuant to §302.71 of this chapter.

No. 76-999

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MAY 24 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1976

JANE COE, ET AL., PETITIONERS

v.

JOSEPH A. CALIFANO, JR., SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion and order of the district court (Pet. App. A) are reported at 426 F. Supp. 774.

JURISDICTION

The judgment of the district court was entered on November 23, 1976. Petitioners filed a notice of appeal to the court of appeals on December 13, 1976, and an amended notice on December 15, 1976. The record was docketed in that court on December 16, 1976. The petition for a writ of certiorari before judgment was filed on January 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Sections 454(4) and 402(a)(26) of the Social Security Act, 42 U.S.C. (Supp. V) 654(4) and 602(a)(26), provide, effective August 1, 1975, (1) that states participating in the Child Support and Establishment of Paternity program must attempt to establish the paternity of children born out of wedlock and to secure child support payments from any person legally liable for such support, and (2) that aid recipients under the Aid to Families with Dependent Children program must cooperate with such state efforts as a condition of eligibility. Those provisions are subject to a "good cause" exception if it is determined, in accordance with regulations to be promulgated by the Secretary and submitted to and approved by the Congress, that compliance would not be in the best interests of the child.

The question presented is whether Congress intended for the mandatory recipient cooperation and state enforcement aspects of the foregoing provisions to take effect on August 1, 1975, as provided, even though the Secretary's good cause regulations would not by then be promulgated and approved.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth at Pet. App. B.

STATEMENT

1. This case involves the construction of federal legislation designed to strengthen state efforts to establish the paternity of children born out of wedlock and to secure child support payments from persons legally responsible for such support. In 1975, Congress passed Pub. L. 93-647, 88 Stat. 2337. That statute added to Title IV of the Social Security Act a new Part D, the Child Support and Establishment of

Paternity program, providing for federal financial and technical assistance to approved state child support programs (Sections 451-460, 42 U.S.C. (Supp. V) 651-660), and amended Part A of Title IV—the program of Aid to Families with Dependent Children—to provide that state plans under that program must require, as a condition of eligibility, that aid applicants or recipients assign to the state any rights to support from any other person and cooperate with state efforts to establish paternity and to secure support payments. 42 U.S.C. (Supp. V) 602(a)(26).

A state wishing to participate in the Child Support program must submit to the Secretary of the Department of Health, Education, and Welfare a plan providing, *inter alia*, for the establishment of a state agency that will undertake to establish the paternity of and to secure support payments for any child with respect to whom an assignment of rights under Part A has been made. That agency (the "IV-D agency") must be different from the agency administering the AFDC program (the "IV-A agency"). 42 U.S.C. (Supp. V) 654(4).[1]

2. Pub. L. 93-647 initially was scheduled to take effect on July 1, 1975 (Pub. L. 93-647, Section 101(f), 88 Stat. 2361). On June 30, 1975, however, Congress postponed the effective date to August 1, 1975 (Pub. L. 94-46, Section 2, 89 Stat. 245), and then passed Pub. L. 94-88, 89 Stat. 433, amending Pub. L. 93-647 in several respects. The obligation of the AFDC applicant or recipient to cooperate with state efforts to establish paternity and secure support payments was made subject to exception upon a finding of

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[1] Participation by the states in the AFDC program is optional, but any state participating in that program must participate in the Child Support program as well. Section 402(a)(27), 42 U.S.C. (Supp. V) 602(a)(27).

"good cause for refusing to cooperate as determined by the State [IV-A] agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child * * *." Pub. L. 94-88, Section 208(a), 89 Stat. 436 (42 U.S.C. (Supp. V) 602 (a) (26)(B)). Similarly, the obligation of the IV-D agency to attempt to determine paternity and to secure child support payments was made subject to exception if the IV-A agency has determined in accordance with the Secretary's standards that compliance would not be in the best interest of the child. Pub. L. 94-88, Section 208(b) and (c) (42 U.S.C. (Supp. V) 654(4)(A) and (B)). The amendments further provided that the good cause standards prescribed by the Secretary must be submitted to the Congress, to take effect sixty days thereafter unless disapproved by either House. Pub. L. 94-88, Section 208(d)(1), 89 Stat. 436. Finally, Congress provided that the amendments would become effective on August 1, 1975, "unless otherwise specified therein." Pub. L. 94-88, Section 210, 89 Stat. 437.[2]

3. The Secretary's regulations implementing the mandatory recipient cooperation and state enforcement requirements of the new legislation became effective on August 1, 1975 (40 Fed. Reg. 27154-27169; see also 40 Fed. Reg. 31766-31767). The regulations implementing the recipient cooperation requirement under Part IV-A provide for no exceptions to that requirement. 45 C.F.R. Part 232. The regulations implementing the new Child Support program provide for no exceptions to the IV-D agency's obligation to seek support payments, and provide for only a narrow exception to that agency's obligation to attempt to

[2]Pub. L. 94-88 was signed into law on August 9, 1975.

establish the paternity of children born out of wedlock. 45 C.F.R. Parts 301-304.[3]

The Secretary has published proposed "good cause" regulations (41 Fed. Reg. 34298), but those regulations have not yet been submitted to Congress and therefore are not yet in effect. HEW has been enforcing the mandatory requirements since their effective date of August 1, 1975, and has taken the position that, although the states are not authorized to amend their Part IV-A plans to include formal standards for implementing the "good cause" exception, until the Secretary's regulations are in effect the states should "utilize care and common sense in administering its program so that children and their custodial parents or caretaker relatives will not be harmed by the support enforcement process."[4] In addition, the Secretary has taken the position that federal funds will not be withheld from

[3]45 C.F.R. 303.5(b) provides:

> The IV-D agency need not attempt to establish paternity in any case involving incest or forcible rape, or in any case in which legal proceedings for adoption are pending, if, in the opinion of the IV-D agency, it would not be in the best interests of the child to establish paternity.

[4]Memorandum of November 21, 1975, from HEW Acting Director, Office of Child Support Enforcement, to Elmer W. Smith, Acting Regional Director, Office of Child Support Enforcement (printed at Appendix F of the Jurisdictional Statement in *Maher* v. *Doe*, No. 76-878); see also letter of July 30, 1976, from Charles C. Gentile, Acting Regional Director, Office of Child Support Enforcement, Region I, to Vincent Capuano, Chief of Eligibility Services, Connecticut Department of Social Services (also printed at Appendix F in *Maher*).

Although the foregoing documents refer expressly only to the IV-D agency's enforcement responsibility, we are informed by the Secretary that HEW also takes the position that the IV-A agency should not declare an unwed mother ineligible for assistance for a failure to cooperate with the state enforcement efforts unless that agency has first made a determination that "good cause" for the failure does not exist.

states that incur welfare payment obligations as a result of "a good faith effort to ascertain on a case by case basis whether cooperation in establishing paternity would not be in the child's best interests."[5]

4. Petitioners, the National Welfare Rights Organization, the State of Alaska, and five mothers receiving AFDC benefits on behalf of their dependent children, brought this action in the United States District Court for the District of Columbia seeking a writ of mandamus to compel the Secretary to promulgate "good cause" regulations and an injunction restraining him in the meantime from enforcing his regulations implementing the mandatory recipient cooperation and state enforcement provisions of 42 U.S.C. (Supp. V) 602(a)(26) and 654(4). On cross-motions for summary judgment, the district court ruled that mandamus was inappropriate because the Secretary already has issued proposed "good cause" regulations (Pet. App. 5a and note 4) and denied injunctive relief on the grounds that the statutory scheme and its legislative history indicate that Congress had been aware that the "good cause" regulations would not take effect until some time after August 1, 1975, but had nonetheless intended for the mandatory provisions of the legislation to become effective on that date (*id.* at 9a-11a). The court accordingly granted summary judgment in favor of the Secretary (*id.* at 11a).

Petitioners filed a notice of appeal in the court of appeals on December 13, 1976, and now seek a writ of certiorari before judgment in that court.

ARGUMENT

1. Rule 20 of the Rules of this Court provides that a writ of certiorari before judgment in the court of appeals "will be granted only upon a showing that the case is of such

[5]Letter of July 30, 1975, *supra*, note 4.

imperative public importance as to justify deviation from normal appellate processes and to require immediate settlement in this court." This case does not meet that standard. The issue of statutory construction raised by petitioners affects only a relatively small number of individuals and in any event will become moot upon promulgation by the Secretary and approval by Congress of "good cause" regulations.[6] It does not compare in importance with the issues at stake in the handful of past cases in which the Court has granted a writ of certiorari before judgment in the court of appeals. *E.g., United States* v. *Nixon*, 418 U.S. 683; *Bolling* v. *Sharpe*, 347 U.S. 497; *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579. "[D]eviation from normal appellate processes" and "immediate settlement in this court" therefore are not warranted.

2. Nor does the presence on the Court's appellate docket of *Maher* v. *Doe*, No. 76-878, involving related issues, warrant certiorari at the present stage of this case. As we have explained in our brief *amicus curiae* in *Maher*,[7] the decision in that case is ambiguous as to whether the states currently are entitled to make their own *ad hoc* "good cause" determinations in connection with the enforcement of the mandatory provisions of the new federal legislation, or whether they must forego enforcement altogether until the Secretary's regulations are in effect.[8] Moreover, since the date of decision in

[6]We are advised by the Secretary that he anticipates submitting "good cause" regulations to Congress within as soon as two months, but in any event no later than the end of the calendar year.

[7]We are sending petitioners' counsel a copy of that brief.

[8]It therefore is impossible to determine whether, as petitioners contend (Pet. 13-14), the result in *Maher* conflicts with the decision in this case.

Maher—which concerns, *inter alia*, the State of Connecticut's ability to enforce, in light of the federal enactments, a state statute subjecting unwed welfare mothers to contempt sanctions for refusing to name the putative father of their illegitimate children—Connecticut has passed a new law that would appear to bear directly on the issues involved in that case. For that reason, and because the decision in *Maher* is ambiguous, we have suggested that the Court should vacate the judgment of the three-judge district court in that case and remand for reconsideration and clarification. In addition, even if probable jurisdiction were noted in *Maher*, it is not certain that the Court would reach the merits of that case inasmuch as the district court's judgment interferes with pending state contempt proceedings, in apparent contradiction of the principles enunciated in *Judice* v. *Vail*, No. 75-1397, decided March 22, 1977. In these circumstances certiorari should not be granted in the present case simply because of the pendency of the appeal in *Maher*.[9]

3. The district court correctly refused to enjoin the Secretary from requiring the states to enforce the mandatory provisions of the new federal enactments until the Secretary's "good cause" regulations are in effect.[10] Con-

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[9]Moreover, even if the Court noted probable jurisdiction in *Maher* and rendered a decision on the merits before the Secretary's "good cause" regulations are in effect, petitioners would be entitled, in the court of appeals, to claim the benefit of any aspects of such a decision favorable to them. In short, whatever the disposition in *Maher*, there is no compelling reason for the Court to consider the present case at this time.

[10]Pub. L. 94-88, 89 Stat. 433, amended Pub. L. 93-647, 88 Stat. 2337, not only by adding the "good cause" exception to the requirements established by the earlier Act but also in several other respects. Section 210 of Pub. L. 94-88, 89 Stat. 437, provided that all of the amendments were to take effect on August 1, 1975, "unless otherwise specified

gress provided that all aspects of the new legislation were to become effective on August 1, 1975, and the states accordingly were obliged from that date on to enforce both the mandatory cooperation and enforcement requirements and the "good cause" exception to those requirements. Even though the Secretary's "good cause" regulations could not possibly have been promulgated and approved by August 1, 1975, it does not follow that, in the interim, the states should either forego enforcement of the mandatory requirements or enforce those requirements without regard to the best interests of the children involved in individual cases. As we noted in our brief in *Maher* (p. 6 and n. 8), the first alternative would defeat Congress' intent that illegitimate children enjoy the benefit of the mandatory paternity and support provisions of the legislation as of August 1, 1975, and the second would frustrate Congress' desire to assure that enforcement would not be undertaken in the small number of cases where the child's best interests are to the contrary.[11]

Accordingly, the Secretary has taken the position that, until his "good cause" regulations are effective, the states should enforce the mandatory provisions of the legislation

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therein." The district court ruled (Pet. App. 10a-11a) that the requirement that the Secretary submit his "good cause" regulations to Congress for its approval indicated that Congress intended to include the effective date of the "good cause" exception among those "otherwise specified." We agree with petitioners (Pet. 32), however, that the "unless otherwise specified" language probably was meant to refer to a separate provision of Pub. L. 94-88, expressly affording the states seven months in which to implement the requirement in 42 U.S.C. (Supp. V) 602(a)(26)(A) that aid recipients assign support rights to the states (see pages 2-3, *supra*).

[11]Congress believed that the establishment of paternity and securing of support would be in the best interests of the child in most cases. See S. Rep. No. 93-1356, 93d Cong., 2d Sess., pp. 42-44, 48-52 (1974).

in accordance with their own "good cause" determinations made on a case-by-case basis (see pages 5-6, *supra*). Contrary to petitioners' suggestion (Pet. 17, 26), the Secretary has not insisted that the states enforce the mandatory requirements without regard to "good cause" exceptions. Rather, he has determined that, since 42 U.S.C. (Supp. V) 602(a)(26) provides that the Secretary shall promulgate "good cause" regulations, the states are not authorized to amend their Part IV-A plans to reflect the adoption of across-the-board "good cause" standards until the federal regulations are in effect. In the meantime, however, the states are free to make their own "good cause" determinations, without fear that federal funding will be withheld, provided that those determinations are reasonable and are made in good faith. See pages 5-6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-999

JANE COE, *et al.*,

Petitioners,

— against —

JOSEPH A. CALIFANO, JR., Secretary of Health, Education, and Welfare,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The Solicitor General's Brief in Opposition confirms that the district court incorrectly construed the Social Security Act provisions at issue in this case. His brief actually supports the granting of this petition and the affirmance of the appeal in *Maher* v. *Doe*, No. 76-878. (Petitioner Alaska has previously filed a brief as *amicus curiae* in *Maher*, urging affirmance.)

1. The Solicitor agrees with our contention that the sole basis for the district court's interpretation of P.L. 94-88 was incorrect. Resp. Br., pp. 8-9, n. 10.[1] The Solicitor

[1] The Solicitor concedes that the provision in P.L. 94-88 providing for an August 1975 effective date "unless otherwise speci-

agrees that the good cause/best interests exceptions to the cooperation and child support enforcement requirements are presently in effect. This admission alone justifies the granting of *certiorari* and reversal since there is no other basis upon which Respondent can prevail.

2. The Solicitor argues, however, that while Congress intended the good cause/best interests exceptions to be effective prior to the effectiveness of the HEW standards, they may be applied only on an *"ad hoc"* basis, without standards to guide state decision-making. See Brief of the United States as *Amicus Curiae, Maher* v. *Doe,* No 76-878, at 4; Resp. Br. at 5-6, 9-10. Indeed, his view of the Act would forbid objective, across-the-board standards to be developed and utilized by the states. Resp. Br. at 10. Petitioners agree that the Act forbids states from establishing their own standards, see *infra,* p. 8, but we disagree that *ad hoc* decision-making is authorized by the Act.

Nothing in the federal statute or its legislative history authorizes or requires the states to make *ad hoc* exceptions to the cooperation and child support requirements, or authorizes the Respondent to allow the states to do so. Congress' intent in this regard was expressed in its specific command that good cause/best interests determinations be made by the states "in accordance with *standards* prescribed by the Secretary, which *standards* shall take into consideration the best interests of the child on whose behalf aid is claimed." 42 U.S.C. §602(a)(26)(B) (emphasis added). Congress not only rejected the notion of standard-

fied" was not intended, as Judge Corcoran believed it was, to postpone the effective date of the good cause/best interests exception.

less decision-making, but it deprived the states of power to devise their own standards.[2]

Congress' rejection of standardless decision-making reflects generally accepted Constitutional due process requirements. See, e.g., *White* v. *Roughton,* 530 F.2d 750, 754 (7th Cir. 1976); *Holmes* v. *New York City Housing Authority,* 398 F.2d 262, 265 (2d Cir. 1968); *Hornsby* v. *Allen,* 326 F.2d 605, 610 (5th Cir. 1964). See also *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *Morton* v. *Ruiz,* 415 U.S. 199, 232 (1974). Indeed, even if the statutory term "best interests of the child" were ultimately held applicable to *ad hoc* decisions, see n. 2, *supra,* and held to provide a sufficiently specific standard at least for due process purposes, it is doubtful that Congress either intended or had the power to prevent states such as Petitioner Alaska from providing across-the-board standards to guide local welfare administrators in the application of that vague term. Cf. *Shapiro* v. *Thompson,* 394 U.S. 618, 641 (1969). Such standards would be needed in order to minimize arbitrary and disuniform decision-making, and to permit persons subject to the statutory requirements to make a realistic and intelligent assessment of whether or not they have a valid claim to an exception. See, *e.g.,* K.C. Davis, Discretionary Justice, A Preliminary Inquiry (1971), at 102.

The Solicitor contends, however, that absent *ad hoc* decision-making Congress' intent would be frustrated. He reaches this result by positing the two other possible interpretations of the statute, both of which he then claims would defeat the legislative purpose. See Resp. Br., at 9.

[2] Moreover, nowhere is it even claimed by the Respondent that the *ad hoc* decisions are required to be guided by the statutory standard "best interests of the child."

One such interpretation, however, the one urged by Petitioners, does not defeat Congress' intent.

Thus, if the *mandatory* aspects of the child support program were enjoined, cooperation and paternity and support enforcement would continue to proceed in those cases in which mothers do not contend that their cooperation or the state's support enforcement would injure the child, and in those cases the children and the states would benefit from the child support provisions. Nothing in the injunction requested by Petitioners would bar enforcement in the likely majority of cases in which the mother is quitee willing to cooperate.[3]

On the other hand, because cooperation is being compelled pursuant to HEW's published regulations, some children are presently being harmed. The harm to these children is conceded by the Solicitor to be a frustration of Congress' intent. Resp. Br. at Reg. 9. The relief requested by Petitioners, an injunction against the program's compulsory features, would accommodate Congress' specific desire to avoid injury to children because of the federal child support provisions, without doing violence to any other Congressional purpose.[4]

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[3] Indeed, pursuant to the *Maher* injunction, Connecticut informed its eligibility workers that a mother may not now be found ineligible "if she is unwilling to cooperate." Conn. Public Assistance Manual, Vol. I, Ch. III, Supp. IV-D, §404.6. Obviously a mother may cooperate if she wants to because she believes it will not hurt her child.

[4] Of course, as soon as the Secretary's standards are final, those cases claiming an exception would be reviewed to make sure that the mothers' claims are sustainable under the standards. Again, in compliance with the *Maher* injunction, Connecticut responsibly advised its workers that "[p]ending the establishment of the aforesaid [HEW] standards, a tickler will be established by the support workers to review the case when a policy is issued." *Ibid.*

It is conceded, of course, that if Petitioners prevail there will be some mothers who ultimately will be found *not* to have good cause once the standards are available for application, despite their good faith claims. Given the fact that Congress hardly anticipated such an inordinate delay by HEW in complying with the statutory mandate, *Calvert Cliffs' Coordinating Comm.* v. *Atomic Energy Comm.*, 449 F.2d 1109, 1120 (D.C. Cir. 1971), this was undoubtedly a problem Congress considered insignificant given the alternative.

Also, the Court should not lose sight of the fact that even at this late date the Respondent promises final rules only by the "end of the calendar year," Resp. Br., p. 7, n. 6. Even if this promise is kept, Congress has 60 days to review those standards, and may well disapprove them if they do not accord with Congress' wishes. Even if this timetable is met, and Congress does not disapprove, Petitioners and others will still wait for enforcement of P.L. 94-88 until March 1978, ten months from now and 2½ years after its effective date.

3. In addition, despite the Solicitor's contention in this litigation that *ad hoc* good cause determinations should be made by the states, *HEW in fact has not implemented this interpretation of the Act.* For this reason too, Petitioners are entitled to relief, and *certiorari* is warranted.

First, the published regulations of the Secretary, 45 C.F.R. §232.12, do not provide for the supposed state *ad hoc* exceptions. See *Morton* v. *Ruiz, supra,* 415 U.S. at 230-36 (1974).

Second, there has been no unpublished HEW policy directive *requiring* the states to make good cause determinations on an *ad hoc* or any other basis. While the Solicitor has informed the Court that he was advised by the Secretary that states "should" make their own good cause/best interests determinations on a case-by-case basis, Resp. Br. at 5 and at 9, no such instructions have ever been communicated to the states. Even the November 1975 memo cited by Respondent for authority states only that HEW "would *hope* that the IV-D agency would . . . utilize care and com-

mon sense." See Appendix F, p. 44, Jurisdictional Statement, *Maher* v. *Doe,* No. 76-878 (emphasis added).[5]

Similarly, while sanctions for non-cooperation are required to be imposed by welfare agencies administering Part A of Title IV, *not* the IV-D child support agencies, such IV-A agencies have not been provided by HEW with any instructions regarding the alleged case-by-case exceptions. Though it is urged that the cited November 1975 memo applies to IV-A agency eligibility determinations, Resp. Br. at 5, n. 3, even though on its face it refers only to implementation of the child support enforcement responsibilities of the IV-D agency, no citation is provided to any federal communication to the states that this policy applies to IV-A agencies. Indeed, Petitioners Coe and Doe *both* received fair hearing decisions from the Pennsylvania IV-A agency finding that cooperation would be against their children's interests, but the state IV-A agency found in each case that since there were no present regulations authorizing exceptions, sanctions would have to be imposed.

In short, at the most, the Respondent's *ad hoc* decision-making theory is an interpretation of P.L. 94-88 which only provides relief to those state welfare agencies that are aware of HEW's supposed case-by-case exception policy and that wish to be freed of the *per se* rule of the Secretary's regulations. See, Resp. Br. at 10. This litigation-tailored theory provides no relief to AFDC beneficiaries such as Petitioners who do not have the fortune to

[5] This is implicitly acknowledged by the Solicitor's statement in his *Maher* amicus (p. 7, n. 11) that states "*may* follow the Secretary's *advice* and apply *ad hoc* 'good cause' exceptions on a case by case basis." (Emphasis added.)

live in states that conclude that they are authorized to make *ad hoc* exceptions, and that choose to do so. Clearly, however, P.L. 94-88 was designed not simply to protect *states* from loss of federal matching funds, but to protect *children* from possible injury as a result of the new federal child support provisions.

4. The Solicitor's argument that the pendency of *Maher* v. *Doe,* No. 76-878, does not warrant *certiorari* before judgment since that case is allegedly not ready for decision, proves specious upon close examination.

First, the purported lack of clarity to the *Maher* judgment simply does not exist. All parties in *Maher* agree that the judgment in that case bars the state from terminating aid for non-cooperation until such time as the cases of non-cooperative mothers can be evaluated under mandated HEW standards. The *judgment* in *Maher* so provides. See Jurisdictional Statement, *Maher* v. *Doe,* No. 76-878, App. B; *Doe* v. *Maher,* 414 F. Supp. 1368, 1382 (D. Conn. 1976).[6]

The Solicitor apparently is confusing the *judgment* which this Court is asked by Connecticut to review, with the *opinion* of the lower court. Even if it were true that the opinion could be read as somewhat ambiguous, a point with which we disagree, the judgment speaks for itself and must be evaluated on its own merits for consistency

[6] The *Maher* judgment forbids Connecticut from terminating the AFDC payments of non-cooperative mothers until "full compliance" with §402(a)(26) "as amended," i.e. full compliance with HEW's best interests standards. The *judgment* in *Maher* thus conflicts with the judgment in this case, which authorizes Respondent to enforce §402(a)(26) as it read *prior* to amendment and without requiring compliance by the states with the best interests standards.

or inconsistency with federal law. Indeed, if clarification *were* needed, the judgment fully supplies this Court with the district court's actual intent. If the *Maher* appellees were entitled to the injunction that was in fact issued, they are entitled to an affirmance, whether or not the court's legal reasoning or conclusions of law were as clearly written as the Solicitor might have preferred. Cf. *Dandridge* v. *Williams,* 397 U.S. 471, 475 n. 6 (1970).

Second, the enactment of the new state statute has no relevance to the issues on this appeal and provides no justification for a remand to the district court. The statute on its face requires the Connecticut Commissioner to "adopt by regulation . . . standards as to good cause and best interests of the child . . . ." C.G.S.A. §17-82b, quoted in the Brief of the United States as *Amicus Curiae* in *Maher* v. *Doe,* No. 76-878, p. 9. But, as the Solicitor candidly advised, it is HEW's position that "the states are not authorized to amend their Part IV-A plans to include formal standards for implementing the 'good cause' exception . . . ." Resp. Br. at 5. See also Resp. Br. at 10.

Given the fact that the state statute may not be implemented by Connecticut prior to issuance of HEW's standards, at least while Connecticut continues to receive federal AFDC funds, e.g., *Townsend* v. *Swank,* 404 U.S. 282 (1971); *Rosado* v. *Wyman,* 397 U.S. 397 (1970), the new statute has no bearing on the *Maher* appeal. Unlike *Fusari* v. *Steinberg,* 419 U.S. 379 (1975), cited by the Respondent, and *Kremens* v. *Bartley,* 45 U.S.L.W. 4451 (May 16, 1977), where intervening relevant state statutes were fully in effect and therefore potentially changed the nature of the state programs under attack, the new Connecticut statute

is inoperative. It thus has no bearing on the Connecticut program and, therefore, the federal issues at this time.[7]

Finally, the Respondent's suggestion that *Judice* v. *Vail,* —— U.S. ——, 97 S. Ct. 1211 (1977), might prevent this court from reaching the merits in *Maher,* see Resp. Br. at 8, fails to take account of the fact that with respect to the common issues raised by *Coe* and *Maher, Judice* is irrelevant since no injunction against state proceedings is involved. The *Maher* injunction restrains Connecticut from denying welfare eligibility *and* from proceeding with contempt citations. The injunction against imposition of the eligibility sanction does not implicate any state judicial proceeding, and *Judice* (and the comity cases on which it is based) does not affect a federal court's power to compel prospective compliance with federal AFDC statutory requirements. Cf. *Doe* v. *Maher, supra,* 414 F. Supp. at 1382 (Newman concurring).[8]

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[7] Respondent's position that Connecticut (and Alaska) are not free to adopt good cause standards is clearly a correct one. 42 U.S.C. §602(a)(26)(B) explicitly requires that good cause exceptions be made by the states under HEW standards. There is no reason to remand *Maher* to the district court for that court to make such an obvious determination, particularly in light of the prior remand in that case, and all of the factors necessitating a prompt resolution of the federal issues which are set forth in the Petition for Certiorari in this case.

[8] *Judice* is also inapplicable to the aspect of the judgment barring contempt citations. The district court in *Maher* found that the Connecticut scheme did not allow the federal plaintiffs to raise the federal issues in a defense to the contempt proceeding, *Doe* v. *Maher, supra,* 414 F. Supp. at 1375-77. See *Judice* v. *Vail, supra,* 97 S. Ct. at 1218; *Gerstein* v. *Pugh,* 420 U.S. 103 (1975).

CONCLUSION

The petition for a writ of *certiorari* before judgment should be granted, and the judgment below should be summarily reversed. In the alternative, if probable jurisdiction is noted in *Maher* v. *Doe*, No. 76-878, this petition should be granted and the cases set down for argument together.

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